1941

File No. O. Cr. P.C./41

K

Legal DEPARTMENT
BRANCH

Subject:—

Opinions under the Criminal Procedure Code

P 47E

File. No. O. Cr. P.C./41

Std. Stat. Slip 24-B

96-A.

C O N T E N T S.

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* in British India & sent to jail in British India or whether they should be tried in the Courts.

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K.N.P.
4/6
2.C.

Office of the R.L.A.

As stated by the Chief Presidency Magistrate in his U.R. at page 4 ante, the Honorary Presidency Magistrates are appointed by Government under section 18 of the Criminal Procedure Code. That section empowers the Provincial Government to appoint a sufficient number of persons to be Presidency Magistrates. The appointment of the Sheriff of Bombay is made in view of the provisions of the Letters Patent of the High Court of Bombay. There is nothing therein to suggest that the Sheriff cannot sit on the Bench of Presidency Magistrates. There is no prohibition in this Province as in section 17 of the Sheriffs' Act of 1887 (50 & 51 Vict. c. 55' and the latter enactment does not appear to be applicable to India (see the Collection of Statutes Relating to India, Volume I, pages 596-598). There does not her therfore appear to be any legal objection to Mr. Kennedy sitting on the Bench of Honorary Magiserates. The draft letter at page 5 ante is legally in orders.

Sd/- P. N. Mody.

o.C. Remembrancer of Legal Affairs.

U.R. to H.D., No. 497, dated the 20th January 1941.

K.N.P.
31/5
4.C.

Office of the R.L.A.

Clause (c) of sub-section (1) of section 526, Criminal Procedure Code, refers to the expediency for ends of justice and not to any expediency form a political point of view. Therefore the fact that certain classes of the inhanitants of a town or district are excitable people and that it is necessary to allay their irritation to prevent possible consequences is not a ground for transfer. In I.L.R. 6 Cal. 491 the court held that it was not a sufficiant reason for transfer that the case was causing considerable excitement in the district and most of the inhabitants of the district had their sympathies enlisted on the one side or the other (see Sohoni's Criminal Procedure Code, 14th edition p. 1028). Consequently that the trial of the present case if held at Nadiad is likely to disturb public peace would be no valid ground for transfer to another district under section 526(1), Criminal Procedure Code. The view taken by the Secretary Home Department, at p. 7 ante on this point appears to be correct.

2. In I.L.R. 25 Cal. 727 where the District Magistrate and the District Judge reported emphatically expressing their belief that it would be next to impossible to expect a fair and impartial trial if the case be heard before a jury chosen from a particular district the High Court held that the bare expression of such belief quite apart from the foundations they must shake the confidence of the parties and ordered the transfer of the case to another district. It is doubtful whether the same can be said of a trial with the aid of assessors as in the present case for the jury in a case triable by jury constitute a part and an important part or the tribunal, but in a trial with the aid of assessors the judge is the sole tribual and judge of law and fact and the responsibility of the decision rests solely with him though in the decision of the case he is expected to take into consideration the opinion of each assessor (14 B.L.R. 710).

In view of the last sentence in paragraph 5 at page 4 ante

the correct course appears to be that if a suitable application for transfer is made on behalf of the accused Government may not oppose it but I doubt whether in a case like the present Government should take the initative and itself file an application for transfer in the High Court.

Sd/- P. N. Moos

D.C. Remembrancer of Legal Affairs.

U.R. to the H.D. No. 49 Confl. dated the 31st January 1941.

K.N.P.
31/5
A.C.

Office of the R.L.A.

Reading section 8(2) of the Colonial Prisoners Removal Act, 1884 (47 and 48 Vict. c. 31), with section 401(5) of the Criminal Procedure ode it appears that in this case it will be open to His Maghsty to grant any conditional or unconditional remission. In such an event no formal order or decision of this Government will be required and the necessary action will be taken by the Home Secretary on behalf of His Majesty's Government.

2. If, on the other hand the Provincial Government wish to take action under section 401 Criminal Procedure Code. a fromal order of this Government will be necessary. Having regard to the provisions of section 8(1) of the Colonial Prisoners Removal Act, 1884, read with section 401 of the Criminal Procedure Code the best course to achieve the object in view appears to be that the remission propsed should be granted on condition that the convict shall at no time return to India and that in addition to this his release shall be also subject to such other conditions as may be imposed in the license for his release to be granted to him by the Home Secretary. Breach of the condition regarding return to India will be effectively dealt with under section 401(3), Criminal Procedure Code, while breach of any of the other conditions of the release on license will be dealt with under the relevant English law in addition, if necessary to the cancellation of the remission granted under section 401(3), Criminal Procedure Code. (Please see Hals bury's Law of England Vol. 26 paras 433 to 437 at pp. 195-198).

Sd/- P. N. Mood

O.C. Remembrancer of Legal Affairs.

U.R. to H.D. No. 1125 dated the 5th February 1941.

K.N.P.
31/5
4.C.

Office of the R.L.A.

Since a lot must necessarily depend upon what is actually deposed to and how far the Court is impressed with the credibility of the witnesses examined, it is difficult to say what the result of a prosecution will be in a case of this type. The principal offfender viz. Mr. V.B.Ligade, the then Chairman of the Standing Committee is dead. The second important accused viz. Mr. M.R.Ligade has been promised pardon and in any case since he is an accomplice his testimony will require corroboration in material particulars connecting the third accused Mr. Wanjpe in the commission of the offences charged. There does not seem to exist any direct or documentary evidence implicating Mr. Wanjpe the Muncipal storekeeper. He will probably rely upon oral instructions or orders of his superior the Chairman i.e. the deceased Mr. V.B. Ligade. Admittedly the municiapb accounts and records are faulty and the circumstances of the alleged offences show a total absence of supervision, if not deliberate connivance, at many irregularities. It is true that the report of the C.I.D. Inspector shows that it must have been difficult, if not impossible for Messrs. V.B. and M.R. Ligade to implement their conspiracy to defraud the Municipality without the knowledge, and probably also a ctive assistance, of the storekeeper Mr. wanjpe. It is, however, not clear whether in the matter of getting fresh tenders submitted from Mr. M.R.Ligade, the storekeeper Mr. Wanjpe has anywhere committed himself by writing out any of these tenders or portions thereof. Without seeing the statments of Messrs. M.R.Ligade and Wanjpe and the other documents referred to in these papers it is difficult to express any definite opinion in this case . It is not know whether the District Magistrate, Sholapur has consulted the Public Prosecutor. Sholapur before recommending a prosecution in

this case. In view of the complicated nature of the evidence likely to be adduced in this case, it is suggested that if G.D. so desires the District Magistrate may be asked, if he has not already done so, to consult the local public Prosecutor who will have to conduct the prosecution, if any is launched, as to the proppects of its success. Prima facie the view taken in the G.D. note in para.3 at pages 148-151 ante appears to be correct and it does not appear that the evidence available against Mr. Manjpe is sufficiently reliable or strong to justify hopes of a successful prosecution.

SD P. N. Moos

o.c. Remembrancer of Legal Affairs.

U.R. to G.D. No. 2116, dated 10th March 1941.

K.N.P.
31/5
4.C.

Office of the R.L.A.

Under section ~~section~~ 326(1) of the Criminal Procedure Code 1898, the Sessions Judge is required to send a letter to the District Magistrate requesting him to summon the requisite number of jurors or assessors and since there is no other general or special provision in this matter, it is not legally possible to substitute any other magistrate or officer for the District Magistrate in this section. The question of any such Magistrate/in lieu of the District Magistrate, signing the ~~magistrate in lieu of the District Magistrate, signing the~~ summonses issued under section 326 does not therefore survive. Attention in this connection is invited to Forms XXXII and XXXIII in Schedule V to the Criminal Procedure Code. As observed by Secretary, H.D. at p. 34 ante the delegation under section 321 does not in any way affect the the position under sections 326 and 328.

Sd/- P. N. Menon
20/3

O.c. Remembrancer of Legal Affairs.

U.R. to the H.D., No. 2671 dated the 25th March 1941.

K.N.P.
~~31~~ 1/6/
4.C.

Office of the R.L.A.

Since the Commissioner of Policie has already been notified as a Presidency Magistrate and a Presidency Magistrat is not a magistrate of the third class (see section 32 and 144 of the Criminal proceddure Code, 1898), there is no legal objection to his being empowered under section 144 of the Criminal Procedure Code.

Sd/- A.N. Mudd
23/4

o.c. Remembrancer of Legal Affairs.

U.R. to the H.D.,No. 3608 dated the 23rd April 1941.

K.N.P.
1/6
4.C.

Office of the R.L.A.

Since an order of the type under consideration would Govern- have to be challenged in revision befor the High Court, t Government Pleader, High Court was consulted in the matter. A copy of his opinion is sent herewith.

2. It is not clear why the First Class Magistrate in his order dated 18th July 1940 refers to cases wherein the accused are finally surrendered to the Magistrate having jurisdiction i.e. presumably sent up under section 170, Criminal Procedure Code, while the Police Prosecutor, Broach at p. 5 ante observes that the accused was only produced before the Second Class Magistrate who had no power to grant a remand to police custody. Paragraph 3 of the District Magistrate, Broach and Panch Mahals' letter under reference (at p.3 ante) ignores the difference between forwarding an accused under section 167, Criminal Procedure Code, and forwarding him under section 170, Criminal Procedure Code. This difference has been clearly brought out in paragraph 4 of the opinion of the Government Pleader, High Court.

3. As regards power of a competent magistrate to grant a remand to police custody under section 167(2), Criminal Procedure Code, the words "from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit," clearly include a case in which an accused is first remanded to magisterial custody and then at the request of the Police he is again remanded to police custody. It is not necessary that an application for remand to police custody under section 167(2), Criminal Procedure Code must be made simultaneously with the production of an accused under section 167(1), Criminal Procedure Code. In other words, failure to apply for remand to police custody simultaneously with the production of an accused before a magistrate under section 167(1), Criminal Procedure Code is not a bar to the same (or other competent) magistrate's power, under section 167(2),

to grant such remand at a later stage but before the accused is actually sent up under section 170, Criminal Procedure Code. The view that once an accused is sent into magisterial custody under section 167, he cannot under the same section but at a subsequent date, although within the permissible maximum period of fifteen days, be sent into police custody by a competent magistrate acting under section 167(2), is not correct.

Sd/- P.N.Mun

o.s. Remembrancer of Legal Affairs.

U.R. to H.D., No.212 dated the 10th January 1941.

Submitted for appremat & signature

Sd/-

10/1

A.S. R.T.Katarki

A.I.R. Sd/-
10.1.41

R.L.A. Sd/-

K.NPP.
1/6
4.C.

Office of the R.L.A.

Applications in revision for enhancement of sentence can be filed in the High Court, through the Government Pleade under section 439 of the Code of Criminal Procedure, 1898. As regards the procedure to be followed, the attention of the General Department is invited to Chapter VIII of the Rules for the Conduct of Legal Affairs of Government.

Sd/- P.N. Mood

o.c. Remembrancer of Legal Affairs.

U.R.to G.D.,No. 585 dated the 22nd January 1941.

K.M.P.
1/6
4.C.

No.507 of 1941.
C.O.

Office of the Commissioner of Police,
C.I.D. Crime Branch,

BOMBAY, 13th January 1941.

From

The Commissioner of Police,
Bombay.

To

The Public Prosecutor,
Bombay.

SUBJECT:- Re: Procedure regarding release of accused persons on bail by Police.

Sir,

With reference to your letter No.6 dated the 3rd January 1941, I have the honour to state that in Bombay City the Police are guided in the matter of granting bail to accused persons by sections 106 to 110 of the Bombay City Police Act, IV of 1902. According to section 106 where an accused person arrested in a bailable offence is prepared to produce the required bail the Police Officer is bound to release him on bail provided that if he thinks fit he may, instead of taking bail, release the accused on his executing a bond without sureties.

In non-bailable offences, where reasonable evidence exist to show that the accused has committed the offence with which he is charged he is not released on bail but produced before a Magistrate within 24 hours of his arrest for remand in Police custody or otherwise. If however there is no such evidence and the officer consider that some further enquiries are necessary he may release the accused on bail or on his executing a bond to attend at the Police Station at the time and time mentioned.

In most of the cases where bail is granted by the Police, whether in bailable or non-bailable offences, the accused are released on bail to appear before a Magistrate on the following working day and application is made for extension of the bail period from time to time. A few cases, however, occur wherein the officer considers that there is not sufficient evidence or the case is false and the accused are bailed out to attend at the Police Stati

when

when required. In such cases, if after the completion of enquiry a officer finds that the charge against the accused is a false one or that the charge is dum to mistake of facts he submits the case to the Commissioner of police who classifies it as such and cancels the bail bond. In such case the accused is not produced before a Court.

I have the honour to be,

Sir,

Your most obedient servant,

Sd/- ..... Dy.

for Commissioner of Police.

URGENT. No.64 of 1941.

Bombay, 16th January 1941.

Forwaded with compliments to the learned Advocate General in continuation of my Memo No.37/ dated the 11th instant.

Sd/- N.K.Petigara,

Public Prosecutor for Bombay.

K.N.P.
1/6
A.C.

No. 5 of 194

I am inclined to agree with the view of the R. L. A. in his note dated the 3rd of December 1940

2. When the accused in a non-bailable case is sent to a Magistrate with a chargesheet, the Police Officer would appear to be acting under section 173 of the Code and not under section 170. The chargesheet appears to correspond with the report mentioned in section 173(1)(a). That sub section deals alternatively either with the case of the accused being still in the custody of the Police in which case he is to be forwarded in custody to the Magistrate or his being released on bail in which event there is no obligation imposed to forward him in custody to the Magistrate. The Police Officer has power under section 497 to release an arrested or detained person on bail even when he is accused of a non-bailable offence. It would therefore, appear that if the Police Officer acting under that section has released a person arrested or detained who is accused of a non-bailable offence, it is not necessary in law that the Police Officer should when sending his chargesheet to the Magistrate in that case forward the accused in custody to the Magistrate.

3. Section 170(1) seems to deal with a case in which the investigation is still incomplete and the accused is being forwarded to the Court in order to enable the Court to act under section 344.

4. This is the view of the two sections adopted by the Allahabad High Court in the case reported in 1931 A.I.R. 617. I do not think that the point arose for decision in Criminal Reference No.422 of 1938 before the Bombay High Court.

Sd/- M.C. Setalvad.,
Advocate General.
6.2.41.

K.M.P.
1/6

4.C.

Officer of the R.L.A.

A copy of the letter dated 13th January 1941 of the Commissioner of Police, Bombay, regarding the procedure followed in Bombay for release of accused persons on bail by police, received from the Public Prosecutor, Bombay and a copy of Advocate General's opinion dated 6th February 1941, who was consulted in the matter, are sent herewith.

Sd/- P.N. Moos.
25/2

O.C. Remembrancer of Legal Affairs.

U.R. to H.D. No. 1756, dated the 26th February 1941.

Submitted for approval signature.

Sd/-
25/2.

K.H.P.
1/6
A.C.

Submitted.

pp.153-154 ante (See also pp. 29-30 of O-Gr.P.C./41).

Attention is invited to this office U.R.No.2116, dated 10-3-1941 in which the G.D, was informed that without perusing the statements of Messrs. M.R.Ligade (the contractor) and N.B.Wanjape (the store-keeper) and other documents bearing on the case; it would not be possible to express any definite opinion as to the success or otherwise of the prosecution proposed to be launched against Wanjape. It was also suggested to the G.D. that the D.M.Sholapur should be asked to consult the P.P. Sholapur as to the prospects of the pro-

p. 157 ante.

secution. From the G.D.Memo.No.S-23/225-A, dated 2-4-41, it will be noticedd that the D.M. was asked to consult the local P.P., if he had not already done so, before recommendin a prosecution. The G.D. however has not called for the statements of M.R.Ligade and Wanjape as desired by the R.L.A.

p.159 -do-

2. The D.M.Sholapur, states that the Public Prosecutor, Sholapur, was consulted in the matter who advised that as the

pp. 163-167 -do-

chances of success were extremely doubtful, the proposed prosecution shouldbe dropped. However, the D.M.and the D.S.P., Sholapur

pp.167-169 -do-

disagreed with the view of the P.P and they recommended that prosecution should be launched against Wanjape.

3. The papers are again referred to the R.L.D. for his advice whether in view

pp. 173-174 -do-

of the opinion of the P.P. Sholapur, the recommendation of the D.M.Sholapur to pro-secute Wanjape should be negatived.

4. The P.P. has examined the question from all its bearings. In para 7 of his opinion he states that the evidence is not sufficiently strong to substantiate a charge of conspiracy to defraud the Municipality and the same conclusion has been reached by the R.L.A. in his U.R. No. 2118, dated 10-3-41. Further in para. 15 of his opinion, the P.P. Observes thus --

> Though one is morally convinced that there must have been a conspiracy between the store-keeper and the the Ligade cousins, the evidence, in my Opinion, is not sufficiently strong to bring home the guilt to any of the conspirators and I would, therefore, recommend that the case should better be dropped especially as the chances of success are extremely doubtful."

The G.D. has not obtained the copies of the Statements as requested in this Office U.R. No.2118, dated 10-3-41. From para.15 of the PP's Opinion it is clear that the evidence available against Wanjape is not sufficiently strong to bring home the guilt to the accused The R.L.A. may, therefore, agree with the view expressed by the P.P.Sholapur that as the chances of a successful prosecution are far remote, the proposed prosecution against Wanjape may be dropped.

A

'A' ul G.D.no. 253-coll. of 10-5-4

3d/- 2/5

~~Please also R.L.A.'s subsidiary on the issue~~

K.H.P.
1/6

R.L.A.'s Office.

Paragraph 9 of Chapter 1 of the High Court Criminal Circulars does not seem to affect the view taken by the Remembrancer of Legal Affairs in his opinion No.10622, dated the 3rd December 1940, concurred in by the Advocate General. That circular clearly states that there is no objection to the Police sending up the case under section 170, Criminal Procedure Code, even though the investigation is not complete. The same view is taken by the Remembrancer of Legal Affairs in the aforesaid opinion where it is stated: "It (section 170, Criminal Procedure Code) applies to the case whenever during the course of the investigation the officer in charge of the Police Station is of opinion that there is sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a magistrate, but the investigation has not been completed. Such a case may arise when the investigation has not been completed and the report to be forwarded under section 173 has not been ready." The Criminal Circular nowhere deals with the distinction between section 170 and section 173 of the Criminal Procedure Code. Since the point has been covered by the decision of the Allahabad High Court in Emp. v. Soobia (1931) A.L.R.,617 and there is no decision of the Bombay High Court to the contrary, the Remembrancer of Legal Affairs' opinion needs no modification.

P.N.M.
14/5

Sd/-

O.C. Remembrancer of Legal Affairs

U.R. to H.D., No. 4498 dated 16th May 1941.

K.N.P.
1/6
A.C.

Office of the R.L.A.

Sub-section (1) of section 260 of the Criminal Prosedure Code provides inter alia that notwithstanding anything contained in the Code, any Magistrate of the first class specially empowered in this behalf by the provincial Government may, if he thinks fit, try all or any of the offences specified therin in a summary way. The words 'if he thinks fit' appear to give discretion judiciously, the Courts would be bound by the principles laid down by the various High Courts in their judicial decisions. It has been held, for example, that a summary trial is undesirable or improper in a case where a large number of correspondence has to be gone into and the case is by no means of a simple character; or in a case in which . from the nature of the dispute and the plea taken by the accused it is apparent that complicated questions of right and title and production of documentary evidence are involved; or in a case which is hotly contested etc. (vide Note 860 under section 260 Mitra's Criminal Procedure Code; and Sohoni's Criminal Procedure Code 1941 Edition p.557).

2. The control by the High Court of the Magistrate's discretion appears to rest on the nature of the cases on his file, and not on their number. There appears however no objection to informing the Magistrates as proposed by the High Court that if their file is not heavy, it is undesirable to apply the summary procedrue in the disposal of cases.

P. N. Mavs

d/- 28/5

O.C.. Remembrancer of Legal Affairs.

U.R. to H.D.No. 4923 dated the 23th May 1941.

R.R.I.
3 1/6
A.C.

R.L.A's Office

Section 401(1) of the Criminal Procedure Code, 1898, provides that when any person has been sentenced to punishment for an offence the provincial Government may at any time without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or part of the punishment to which he gad been sentenced. By virtue of sub-section(4A) of section 401, the provisions of sub-section (1) also apply to any order passed by any Criminal Court under any law which restricts the liberty of any person or imposes any liability. It is true that a child, in respect of whom an order has been made under section 7 of the Bombay Children Act, 1924, cannot be said to be a person sentenced for any Offence. But such a child can be said to be a person in respect of whom an order restricting his liberty has been made. Consequently it would be competent to apply the provisions of section 401 in his case. (See para.2 of R.L.A.'s opinion No. 543, dated the 25th January 1935).

P.N.Mudg

Sd/-

24/5

c.c. Remembrancer of Legal Affairs.

U.R. to H.D. No.4928, dated 29-5-1941.

K.M.P.
1/6

4.C.

Office of the R.L.A.

By an agreement dated 5th July 1897, the Chief of Bhor has surrendered to the British Government certain rights over certain lands within the limits of his state for works in connection with the Lloyds Dam at Bhatgar. By another agreement dated 24th May 1933, the Chief has surrendered certain rights in certain further lands within the limits of his state for the same purpose. It is proposed to post a British Police Guard on this Dam. The question raised for consideration of the Remembrancer of Legal Affairs is whether in case of offences committed in the area of these lands, the offenders should be tried in the Courts in British India and sent to the Jails in British India or whether they should be tried in the Courts of the Bhor State and sent to the Jails of that State.

2. The relevant terms of the two agreements are as under:-

Agreement of 1897.

Article 1.

The Pant, in consideration of the concessions to be made to him by the British Government in accordance with Article 4 of this Agreement, agrees to surrender to the British Government the lands delineated in a sketch plan sighed ny the parties to this Agreement and deposited in the office of the Chief Secretary to the Gogernment of Bombay, and more particularly described in the list marked "A" appended to this Agreement, and signed by the parties hereto, together with all proprietory and other rights possessed by him in and over the same.

Article 2.

The Pant, at the request of His Excellency the Governor of Bombay in Council, also authorizes such officers, as His Excellency in Council may from time to time appoint, to perform the duties of Police Officers, and to exercise Civil and Criminal jurisdiction for and on behalf of himself within the limits of the said lands.

Agreement of 1933.

Article I.

The Pant Sachiv, in consideration of the concessions to be made to him by the British Government in accordance with Articles IV and V of this Agreement, agrees to surrender to the British Government the lands delineated in sketch plans marked "A" and more particularly described in the list marked "B" which are appended to this agreement (hereinafter referred to as the said lands) and signed by the parties hereto, together with all proprietory and other rights possessed by him in and over the same.

Article II

The Pant Sachiv also authorises such officers, as the Governor of Bombay in Council may from time to time appoint to perform the duties of Police Officers and to exercise civil and criminal jurisdiction for and on behalf of himself within the limits of the said lands.

It would appear from these terms and the correspondence relating to these lands in P.&S.D. File 246-IV that although the Chief has parted with his proprietory rights over the lands under consideration he has reserved to himself the civil and criminal jurisdiction within the limits of the lands. It is competent for the British Government to appoint officers to perform the duties of Police Officers and to exercise civil and criminal jurisdiction within the limits of these lands but these officers will perform the duties and exercise the jurisdiction for and on behalf of the Chief of Bhor. The rights of the British Government over these lands are limited by the terms of the agreements. The law according to which the offenders committing offences over these lands will be tried will therefore be the law of the Bhor State and not the law in force in British India. (See paragraphs 2 and 3 of Commissioner, Central Division's letter dated 25th March [illegible] in P.& S.D. File 246-IV, 1930-31).

A person committing an offence within the limits of these lands will have to be dealt with as if he had committed an offence in the Bhor State and not as if he had committed an offence in British India. He can be tried by a court of the Bhor State or by such Officer as the British Government may appoint to exercise such power under the terms of the two agreements referred to above. In either case, however, he can be tried only according to the law of the Bhor State and committed to the prisons in the Bhor State. This view is also supported by the terms of Government Resolution Ploitical Department No. 5652, dated the 13th September 1897 and Government Resolution, Political Department 6422, dated the 13th October 1931, by which certain officers of the British Government have been authorised to perform the duty of Police officers and to exercise civil and criminal jurisdiction within the limits or the lands referred to in the first agreement dated the 5th July 1897. The powers which have been conferred on these officers are the powers which the Courts in Bhor State exercise and not the powers which can be exercised by Courts in British India. Incidentally it may be pointed out that these officers have been appointed only in respect of lands covered by the first agreement and consequently they are not competent to exercise these powers in respect of lands to which the second agreement relates.

Sd/- P.N. Mavo.
2/6

p.c. Remembrancer of Legal Affairs.

U.R.to H.D. (Spl). No. 1-p-Govt/6. dated the 3rd June 1941.

K.N.P.
1/6
4.C.

Office of the R.L.A.

Sub-section (1) of section 321 of the Code of Criminal Procedure, 1898, provides that the Sessions Judge and the Collector of the district or such officer as the Provincial Government appoints in this behalf, shall prepare and make out in alphabetical order a list of persons liable to serve as jurors or assessors. It is not therefore competent for the Additional District Magistrate to participate with the Sessions Judge in the preparation of the list of jurors unless he is specially appointed in that behalf by the Provincial Government. The view expressed by the Deputy Secretary, Home Department, in his note dated 14th May 1941 at page 41 ante is correct.

Sd/- P.N. Mon

o.c. Remembrancer of Legal Affairs.

Sd/-

6/6/41

U.R. to H.D., No. 5202, dated the 9th June 1941.

K.N.P.
1/6
S.C.

Office of the R.L.A.

Under rule 44 of the Law Officers' Rules, the District Public Prosecutor is required to proceed to Bombay or elsewhere beyond his own district in connection with a criminal case if he is directed by the Sessions Judge, the District Magistrate of the Remembrancer of Legal Affairs. The proviso to this rule provides that a District Public Prosecutor shall not be required to proceed to Bombay to assist at the hearing of any case in the High Court unless the Government Pleader, High Court, considers that his presence will be necessary. The Government Pleader, High Court, can therefore call for the assistance of a District Public Prosecutor when he desires to have personal instructions from him in a particular case. Except this there does not appear to be any liaison between the Government Pleader, High Court, and the District Public Prosecutors. In the present case, when the appeal came up for hearing in the High Court, the Government Pleader could have brought to the notice of the District Magistrate or the Remembranfer of Legal Affairs the adverse remarks passed by the Sessions Judge, Bijapur, in the Judgment of the lower Court. But this would have resulted in further delay in filling an application for expunging the remarks. The proper course in such a case would be for the officers affected by any such adverse remarks to bring them in good time to the notice of the Government through the District Magistrate or the District Superintendent of Police.

Sd/- P. N. Moos
19/6

o.c. Remembrancer of Legal Affairs.

U.R. to H.D. No. 5494 Dated 20th June 1941.

K.N.P.
2/6
4.C.

Office of the R.L.A.

The Commissioner C.D.'s proposal is that Government should issue a notification under section 12(1) of the Criminal Procedure Code, 1898 appointing the Sub-Divisional Magistrate, S.D., Belgaum to exercise Magisterial powers within certain areas of the Supa Petha of Kanara District. The question referred to the R.L.A. is whether the Sub-Divisional Magistrate, S.D., Belgaum, if appointed to exercise magisterial powers in Supa Petha of Kanara District can try the Supa Petha cases whilee holding Court in the Belgaum District.

2. The answer is in the negative. Section 12 of the Criminal Procedure Code contemplates the appointment of persons as Magistrates. Consequently Government when issuing a notification under this section will have to name the officer holding the post of Sub-Divisional Magistrate, S.D. Belgaum and authorise him to exercise the powers of a Magistrate of the First Class in the Supa Petha of Kanara District. The Officer so appointed will not only be the Sub-Divisional Magistrate, S.D., Belgaum, but also a Magistrate of the First Class under the control of the District Magistrate, Kanara,. That being the position he will not be able to try the Supa Petha cases while holding Court in the Belgaum District , for section 177 of the Criminal Procedure Code provides that every offence shall ordinarily be enquired into and tried by a Court within the local limits of whose jurisdiction it was committed.

Sd/- P. N. Mavo
8/7

S.C. Remembrancer of Legal Affairs.

U .R.to H.D. No 102-P. dated the 8th July 1941.

K.N.P.
1/6 4.C.

Office of the H.L.A.

Section 22 of the Criminal Procedure Code provides that every Provincial Government so far as regards the territories subject to its administration may by notification in the Official Gazette appoint such persons resident within British India and not being the subjects of any foreign state as it thinks fit to be Justices of Peace within and for the territories mentioned in such notification. It is clear from this provision that a person to be qualified for appointment as Justice of Peace must be resident within British India and not a subject of any foreign state and his appointment can be made for the whole of the Province or a part thereof. Sardar Khan Bahadur Dastur is admittedly a resident within British India and not a subject of any foreign state. There is therefore no legal objection to appointing Sardar Khan Bahadur Dastur to be a Justice of Peace under section 22, Criminal Procedure Code.

Sd/- P.N. Mudholkar
29/8.

O.C. Remembrancer of Legal Affairs.

Sd/-
29/8/41

U.H. to H.D. in poona No. 174- P-Confl., dated the 29th August 1941

K.M.P.

1/6

A.C.

R.I.No. 6092 dated 12.7.41.

Submitted.

By G.R. P.D. No. 7107, dated 24.9.191 Govt. sanctioned certain rules defining the scope of direct correspondence between the Police of the Native States under the Rewa Kantha Agency and certain other States. Rule 5 of those rules provides that no Magistrate or Police Officer of a foreign jurisdiction shall be called as a witness to give evidencein a foreign Court in connection with confession, Panchamas or statements recorded or property recovered by them under the Rules. By G.R.P.D.No. 539 dated 19.9.1941, a similar system of direct correspondence between the Police officers of the Native State of Baria (which was included in the Rewa Kantha Agency) and those of the Panch Mahals District Police has been sanctioned and the above rules adopted. Recently the Addl. S.J. Broach and Panch Mahals, issued three commissions under section 503(2) of the Criminal Procedure Code to the Resident for Baroda and Gujarat States to take the evidence of one of the State Magistrates, Mr.M.V. Sheth, in connection with Sessions Cases Nos. 13, 14 and 15 of 1941. The Resident however states that the Baria Darbar has taken onjection to their Magistrates giving evidencein Bombay Courts or before a political officer which it states is contrary to rule 5 of the above rules. The P. and S.D. has since returned the Commissions to the Sessions Judge stating that the Resident has expressed his inability to

execute them. The H.D. has decided to take the matter to the Govt. of India. But before that is done R.L.A. is requested to examine the legal position. The question that arises for the consideration of the R.L.A. is whether an officer to whom a commission is issued under sub-section (2) of section 503 of the Cri. Pro. Code has power to execute such commissions.

2. Under sub-section (2) of section 503 of the Code of Cri. Procedure a commission to take evidence can be issued to a officer representing the Central Govt. or the Crown Representative when a witness resides in any Indian State. Sub-section (3) provides that such officer shall proceed to the place where the witness is or shall summon the witness before him, and shall take down his evidence in the same manner and may for this purpose exercise the same powers, as in trials of warrant-cases under the Code. Sub-section (4) empowers such officer to delegate his powers and duties under the Commission. It is true that in Sikandar vs- The Crown, I.L.R. 9 Lah. 347, it has been held that section 503 Cr. Pr. Code did not contemplate a Resident Political Office in an India state and of there was an officer representing the British Indian Govt. in the territories of any prince or chief a commission can be issued to that officer and that the provisions of section 503(3) are mandatory and the officer cannot decline to execute the Commission on the ground of inconvenience or some other reason. But it appears that such officers have no power to compel the attendance of witnesses (vide Sohoni's Cri. Pro. Code, 1941 edn. PP. 976). Moreover in this particular case the Baria Darbar has taken it

stand on rule 5 of the rules accompanying G.R,P.D. No. 7007, dated 24,9.1912 under which no Magistrate of a foreign jurisdiction can be called as a witness to give evidence in a foreign Court in connection with confessions, Panchnamas or statements recorded for property recovered by them under the rules. It does not also appear that there is any other agreement based on reciprocity in this respect. It appears therefore that as remarked by U.S.H.D. in his note at p. 16 ante section 503(2) will be unworkable if states refuse to allow examinations on Commission. (See the observations of the Lahore High Court in Sikandar v. Emperor A.L.R. 1929 Lahore 910 at pp. 107) The matter appears therefore be worth taking to the Govt. of India.

Sd/-

A.S.

It appears that three Commissions were issued to the Resident for Baroda and Gujarat States by the Additional Sessions Judge, Broach, for the examination of Mr. M.V. Sheth, First Class Magistrate, Eastern Mahals, Baria. These commissions have been returned unexecuted by the Resident for Baroda and Gujarat States on two grounds viz. (1) that the Baria Durbar were unwilling to permit their Magistrates to give evidence either in Bombay Courts or before a Political offic in such matters in breach of the existing agreement and (2) that he has no power to enforce the attendance of witnesses to be examined on commission. The

R.L.A.

is requested to examine whether the objections raised are valid.

Section 503(2) of the Criminal Procedure Code provides that when the witness resides in the territories of any Prince or Chief in India in which there is an officer representing the British Government, the commission may be issued to such officer Sub-section (3) enacts that the Magistrate or officer to whom the commission is issued, or if he is the District Magistrate, he or such Magistrate of the First Class as he appoints shall proceed to the place where the witness is or shall summon the witness before him and shall take down his evidence in the same manner and may for this purpose exercise the same powers, as in trials of warrant cases under this Code. Sub-section (4) lays down that where the commission is issued to such officer as is mentioned in sub-section (2) he may delegate his powers and duties under this commission to any officer subordinate to him whose powers are not less than those of a Magistrate of the First Class in British India. If these provisions are read together it will be clear that when a commission is issued for examination of a witness in a native state, the officer representing the British Indian Government is bound either to proceed where the witness is or to summon such witness before him; or he may delegate his functions to any officer subordinate to him; But he cannot decline to execute the commission on the ground of inconvenience or some other

K.H.
2/6
4.C.

Office of the R.L.A.

The action proposed by H.D. in the note at page 23 ante is legally in order.

2. As pointed out by H.D. in parpagraphs 3 and 4 at pages 12-13 ante, the Rules relied upon in paragraphs 2 and 3 at page 1 ante and reproduced at page 3 ante have no application to executions of commissions under section 503, Criminal Procedure Code, 1898. As their heading shows those rules merely define the scope of direct correspondence between the Police Officers of the States specified and the Kathiawar Agency Police. The Government Resolution No.5392, Political Department, dated 19th September 1914, refers to the adoption of these rules between inter alia the Police Officers of the Baria States and those the Panch Mahals District Police. The rules are thus restricted to correspondence between Police Officers and not to any other correspondence nor other lawful actions. They cannot curtail the statutory powers of a Court, e.g. under section 503, Criminal Procedure Code. As regards the executic of commissions issued under section 503 the attention of the Resident for Baroda and the Gujarat States may be drawn to the decision of the Lahore High Court in Sikandar v. The Crown (I.L.R. 9 Lahore, 47) as more fully reported in A.I.R. 1929 Lahore, 104 at page 106.

Sd/- P.N.Mavo
25/9

O.C. Remembrancer of Legal Affairs.

Sd/-
25/9/41

U.R.to H.D., No. 8460, dated the 26th September 1941.

K.N.P.
2/6
4.C.

2. One Mr. James W. Johnstone Jr., a citizen of New York has addressed a letter to the Public Prosecutor for Bombay, saying that his wife, Mary Schurman Johnston, has contracted a bigamous marriage during April 1940, at Bombay to Captain Richard De Soldenhoff of St. George's Hospital, who it appears is an I.M.S. officer and is at present stationed at Rawalpindi. The lady is at present living at No.4, Palli Hill, Bandra. The applicant has also forwarded certain documents containing material information to the Public Prosecutor for Bombay and has requested him to investigate the information concerning the alleged bigamy and if found correct, to initiate the prosecution of the said Mary Schurman Johnston. The Public Prosecutor has sent a reply to Mr. Johnston to the effect that according to section 198 of the Code of Criminal Procedure, no court in India could take cognisance of an offence falling under section 494 of the I.P.C. (viz. the offence of marrying again during the life-time of husband or wife) except upon a complaint made by some person aggrieved by such offence. and that it was therefore necessary that the complaint if any should be filed by Mr. Johnston and that in the absence fo a complaint to a Magistrate, the P.P. for Bombay cannot take any action of his own accord in the matter The P.P. for Bombay states that no action by him in his capacity either as Public Prosecutor or King's Proctor is necessary

. and requests the R.L.A. to state whether the action taken by him meets with R.L.A's approval.

3. It has been held that in the case of an offence for bigamy committed by the wife the husband is the only person aggrieved by such offence (vide Mitra's Code of Criminal Procedure, p. 700). and unless a formal complaint as defined in section 4(1) ~~thereof~~ (h) of the Criminal Procedure Code is made to the Magistrate by Mr. Johnston in this case. it would not be competent to the Court to take cognisance of the offence. Sec. 198 of the Cr. Pr. Code has been designed to prevent Magistrates from enquiry on their own motion into a case connected with marriage unless the husband or the other authorised person moves them to do so (vide Mitra's Cr. Proc Code; p.698). The P.P. for Bombay cannot therefore take any action in this case. The legal position stated by him in his reply to Mr. Johnston is therefore correct. The P.P. may be informed that the action taken by him is approved.

Sd/-
6/9/41

A.S. It is not known under what provisions the P.P. requests approval of the action taken by him. He may be informed that the Legal Position stated by him in his letter at p. 3 ante is correct. A

Sd/- V.T. Katarki
9/9

A.L.R.

Before sending a reply to Re. P.P. perhaps Re. papers may be shown to H.D. as Re. dept, concerned with BRe. administration.

A

Letter from P.P. for Bombay No. 8522, dt. 29-9-41

K.N.P.
2/6
A.C.

Office of the R.L.A.

The question for consideration of the R.L.A. is whether Government can under section 269(1) of the Criminal Procedure Code revoke the order for the trial by jury by the Court of Session at Ahmedabad as regards murder cases committed to the Sessions Court arising out of disturbances in Ahmedabad in April and May last and direct that they shall be tried with the aid of assessors.

2. The answer is in the affirmative. The question was considered in Queen Empress v. Ganpathi Vanniaser (I.L.R. 23 Mad. 632), In that case the Madras Government had under section 269 of the Criminal Procedure Code revoked the orders of trial by jury as regards persons committed for trial to the Court of Session in Tinnevelly for offences under certain sections of the Indian Penal Code in connection with riots and disturbances which had taken place in the districts of Tinnevelly and Madura, and had directed that the trial of such persons shall be with the aid of assessors and not jury. It was contended that the "class of Offences" referred to in section 269 must be ascertained according to some classification recognised by the Legislature - such as is found in the Penal Code e.g. offences against the State, against the person, or in the Criminal Procedure Code, e.g. bailable offences, cognisable offences. This contention was rejected by the Madras High Court. Their Lordships observed as follows:- "There is no reasons shown for putting this narrow construction on the words. No reasons is suggested why offences should not be classified according to the persons who commit them, i.e. the offences, the offenders, or according to the person or property against whom or which the offences are committed, or in regard to the particular occasion in connection with which they are committed. Thus the fact of offences having been committed by old offenders or members of criminal tribes, or having been committed against women or against public property, would afford reasonable ground for a classification. Here the fact with reference to which the

distinction is made is the fact that an outbreak having taken ~~with reference to which the~~ place directed against a certain section of the population. The offences connected with the outbreak are treated as a class of offences, and in our opinion rightly so. It was accordingly competent to the Government with the consent of the Governor General in Council to revoke the previous notification so far as it related to that class."

3. It is clear from the above judgment that offences of murder arising out of communal disturbances in Ahmedabad in April and May last can be treated as "a particular class of offences" within the meaning of section 269(1) of the Criminal Procedure Code and consequently it would be competent to the Provincial Government to revoke the previous order regarding trial by jury in so far as it may apply to trial of persons charged with such offences. On the issue of such an order the persons charged with these offences would be liable to be tried with the aid of assessors (vide section 268 of the Criminal Procedure Code).

4. A.I.R. 1933 All. 126 referred to by the petitioner at page 3 ante does not appear to have any bearing on the point under consideration.

Sd/- P. N. Modi.
11/11

O.S. Remembrancer of Legal Affairs.

Sd/-
11/11/41

U.R. to H.D., No. 9734, dated the 11th November 1941.

K.N.P.
2/6
4.G.

Office of the R.L.A.

The fact that the Magistrate has already framed charges under sections 120B, 418, 403 read with section 109, Indian Penal Code, shows that in the Magistrate's opinion there is ground for presuming that the accused have committed the offences in question (vide section 254, Criminal Procedure Code, 1898). It is also apparent from the report of the Inspector of Police, General Branch, C.I.D. (pages 19-33 ante) that there is a prima facie case against the accused in respect of the offences in question. There does not therefore appear to be any legal objection to Government giving its consent under section 196A(2) of the Criminal Procedure Code.

Sd/- P. N. Murti
1/12

D.C. Remembrancer of Legal Affairs.

Sd/-
1/12/41

A.S. R.T. Katarki,
1/12

U.R. to H.D., No. 10376, dated the 3rd December 1941.

K.N.P.
2/6
A.C.

Submitted.

2. Mr. B.N.Mody, the Registrar of Companies, has received a summons from the Cour of the Special Magistrate, Lahore, issued un der sections 244,252 and 257 of the Criminal Procedure Code, to appear before the Court t give evidence on behalf of the prosecution i a case in which complaint has been made against one Jagan Nath of Karnal that he has committed an offence under section 409 Indian Penal Code. The summons has bee addressed to Mr.B.N.Mody -Partner of Messrs. S.B.Billimoria and Co., Auditors, Bombay, and it appears from the letter of the Registrar of Companies ante p.1 plenti that the evidence is required in connection with work done by him in about 1926 when he was in charge of the Lahore Branch of Messrs. S.B. Billimoria and Co. Mr.Mody wants that arrangement should be made for his evidence being taken by commission in Bombay, in order to avoid the inconvenience which may otherwise arise in connection with the discharge of his duties i.. Bombay and that Govt. should request the Public Prosecutor, Punjab, to appear on his behalf and to apply for his examination by commission on the ground that being a public officer, it is very difficult for him to leave Bombay, more particularly if he was detained in Lahore for any length of time.

3. As regards the above request of Mr. Mody the F.D. states that it is doubtful whether it is possible to request the Public Prosecutor, Lahore to appear on his behalf and to apply to the Court for his

examination by commission. Mr. Mody has been summoned as a witness not in his official capacity as the Registrar of Companies, Bombay, but as one time parther of the firm of Messrs. S.B.Billimoria and Co., i.e. to give evidence on matters with which he was concerned, before he joined Govt. service. Mr. Mody will have therefore himself to apply to the Court for an examination on commission and the Public Prosecutor, Lahore, cannot be requested to appear on his behalf. At the same time it is a fact that Mr. Mody's absence from Bombay will very much interfere with his duties. In the circumstances the most that this Govt. can do will be to endorse Mr. Modi's plea that it is difficult for Mr. Modi to leave his official duties and to state that if the Court has no objection his examination may be taken on commission. The F.D. therefore proposes to forward a copy of the letter dated 2nd December 1941, addressed by Mr, Mody to the Special Magistrate, Lahore, (p.7 ante) to the Chief Secretary to the Govt. of the Punjab, Lahore. stating that it will be difficult for Mr. Mody to tender evidence at Lahore on account of his public duties and requesting that if the Court has no objection Mr. Mody may be examined on commission. The H.L.A. has been asked to return the papers before issue of the letter.

4. Mr.Mody is not called upon in this case to give evidence in his capacity as Registrar of Companies but in his private capacity. Govt are therefore not concerned except that his absence from Bombay for a few days would interfere with his official duties. His proposal that Govt. should arrange for the appearance

of a counsel on his behalf for applying that he may be examined by commission would amount to granting him legal assistance for ~~ifer~~ which there is now provision in the L.O. Rules. Mr; Mody - request therefore cannot be complied with

5. Mr.Mody has already requested (vide p. 7 ante) the Court to direct his examination by commission in Bombay on the ground of his official duties, and it is suggested by F.D. that Govt. may endorse that plea. For thatpurpose it would perhaps be bett if Govt. were to write to the Magistrate, as it is within his discretion ~~if~~ to decide whether the request for exa nation by commission should or should not be granted. A letter on the proposed lineas should therefore it appears be written to the Magisrrate and a copy of the correspondence should be forwarded to the Govt. of the Punjab.

Sd/-
9/12/41

A.S. The draft Letter at P. 11 ante consains nothing objectionable. papers may be A Seen ar Returned

Sd/- R.T.Katarki
9/12

A.L.R. A

Sd/.
9-12-41

R.L.A. Sd/-
10/12 Ab of

U.R. to F.D. No. 10703 d. 12-12-1941.

K.N.P.
2/6
4.C.

No. 10037

Office of the
Remembrancer of Legal Affairs.
Bombay Castle, 21st November 1941.

From

P.N. Moos, Esquire, Bar-at-Law, I.C.S.,
Remembrancer of Legal Affairs.

To

The Collector of Kaira.

Subject:- Recovery of expenses incurred by Gogernment in taking action under sub-section (3) of section 386 of the Criminal Procedure Code against Ambalal Cavitrshanker of Umreth.

Sir,

With reference to the correspondence ending with your letter No.L.A.W. dated 5th November 1941, I have the honour to state that in view of the Magistrate's direction that the warrant should be returned to him with an endorsement certifying what has been done, the matter will have to be placed before the Magistrate and his orders will have to be taken as regards the Collector's costs.

2.In this connection I am also to state that it is true that the statute authorises the Collector of the District to realise the amount by execution according to civil process against the moveable or immovable property or both of the defaulter (see sections 488(3) and 386(1)(b) Criminal Procedure Code,1898), but it does not follow that the Collector concerned should effect the recovery of the amount leviable under the warrant at his own cost or at the cost of the public treasury. The general principle applicable to amounts so recovered appears to be that the money recovered is applied first in defraying the lawful expenses incurred and the balance, if any, is made available towards the satisfaction of the principal claim (see

e.g. section 73(1)(c) of the Civil Procedure Code). There is no reason why this obviously reasonable and equitable principle should be deparated from in this case. I am, therefore, to request you to ~~ask~~ ask the District Government Pleader to urge that the Collector's costs should be first paid out of the money realised and only the balance, if any, should be ordered to be paid to Bai Bhagirathi.

3. The papers of the case are returned herewith.

I have the honour to be,

Sir,

Your most obedient servant,

o.c. Sd/- R.T. Kelwalkar

for Remembrancer of Legal Affairs.

K.N.P.
2/6
4.C.